



Training Workshop on Trade Policy, Trade Negotiations & Investment Strategy for Kenyan Diplomats

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WTO Agreements

Trade in Services: The General

Agreement on Trade in Services (GATS)

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W T I
a d v i s o r s





- “Warm-Up” Exercise: Trading Services
- Agreements on Trade in Services
- The GATS – The Essentials
 - Coverage
 - Key Disciplines & Exceptions



“Warm-Up“ Exercise: Trading Services

- What are services? (What are goods?)
- How do you trade services internationally?
- How are different services traded differently?
- Are there services that cannot be traded?
- Are there services that should not be traded?
Why?
- How is trade in services regulated?



Agreements on Trade in Services

- Relatively new phenomenon:
 - Recognizing services as tradeable
 - Recognizing and addressing (local) regulation as obstacles to (international) trade
- “Mother of all services agreements”: The *General Agreement on Trade in Services - GATS*
 - Model: the GATT – not a 100% fit
- Regional and bilateral agreements such as the CARIFORUM-EU EPA, EuroMed, etc.



The GATS – Coverage

- **Mode 1:** Cross-border supply (e.g. faxed legal memo, software design via remote access/policy brief via email)
- **Mode 2:** Consumption abroad (e.g. tourism, medical treatment, education abroad)
- **Mode 3:** Commercial presence (e.g. branch of foreign bank, subsidiary of telecoms provider)
- **Mode 4:** Movement of natural persons (e.g. visiting consultants, fashion models, engineers)

→ all “int’l” services covered

The GATS – Coverage (2)

- Communication Services
- Business Services
- Construction and Related Engineering Services
- Distribution Services
- Educational Services
- Environmental Services
- Financial Services
- Health-Related and Social Services
- Tourism and Travel Related Services
- Recreational, Cultural and Sporting Services
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Key GATS Disciplines

- Market access (and progressive liberalisation) by sector, as negotiated → “Specific Commitments”
- Non-discrimination
 - “Most-Favoured Nation” Treatment (MFN): Unconditional
 - “National Treatment”: Only in committed sectors
- Transparency
- Rule of law (and reason): Disciplines on domestic regulation (some now, more under negotiation)



What about Government Services?

- Covered by GATS? Depends!
 - No, if they are “*supplied in the exercise of governmental authority*” – meaning: If they are
 - Not supplied on a commercial basis and
 - Not supplied in competition with other providers
 - Yes, if they are either
 - Supplied on a commercial basis or
 - Supplied in competition with other providers
- (*But note: GATS Coverage does not automatically mean market access rights!*)



- **General Rights and Obligations (Applying to All Regulation Affecting Trade in Services)**
 - Most-Favoured Nation (MFN) treatment
 - Transparency
 - Exceptions

- **Rights and Obligations (Dependent on Specific Commitments, Individually Negotiated)**
 - Market access commitments
 - National Treatment
 - Disciplines on domestic regulation
 - Additional commitments (also “Reference Papers” on competition, e.g. in telecoms)



Example: *Bank on it!*

- Country X plans regulation that requires banks providing certain financial services from Country Y to comply with onerous standards
- Other foreign banks providing the same services are exempt
 - ➔ *Discrimination in violation of Article II of GATS (MFN)*
- Regulation never implemented



Always MFN?

Main Exemptions

- Scheduled MFN Exemptions (*should* be limited in time) – GATS Art. II:2
- Small-scale local cross-border preferences – GATS Art. II:3
- Regional Integration Agreements, GATS Art. V – note conditions:
 - “Substantial coverage” (sectors, volume of trade, modes of supply)
 - Absence/elimination of discrimination



Market Access (Art. XVI)

- Access is granted in sectors/subsectors listed in the country's Schedule of Specific Commitments
- Access is granted to both the service and the service supplier (depending on “modes of supply”)
- Limitations such as quantitative restrictions are allowed as long as they are set out in the Schedule
- Unqualified commitment = full liberalisation = no restrictions on entry by foreign services/providers (unconditional MFN)



National Treatment (Art. XVII)

- Non-discrimination between foreign and domestic services/suppliers.
- Treat foreign services and service suppliers no less favourably than domestic services and services suppliers
- Treatment does not need to be identical as long as the consequences are equitable
- *Applies only to scheduled services (unlike GATT)*



Non-Discrimination – Not always unconditional!

| | | |
|--|---------------|---|
| | | |
| | Unconditional | Unconditional |
| | Unconditional | (only committed sectors and modes, subject to exceptions) |
| | Unconditional | Unconditional |



Scheduled Commitments: The GATS Approach

| Sector or sub-sector | Limitations on market access | Limitations on national treatment | Additional commitments |
|--|--|---|------------------------|
| 4. DISTRIBUTION SERVICES | 1) Unbound | 1) Unbound | |
| A. <u>Commission (commercial) agents' services</u> | 2) None | 2) Unbound | |
| B. <u>Wholesale trade services</u> | 3) Prior to 1 January 2008, only through joint venture with foreign ownership to 49%. After such date, none. | 3) None | |
| C. <u>Retailing services</u> | 4) Unbound except as indicated under horizontal commitments | 4) Unbound except as indicated under horizontal commitments | |



For Comparison: New EU Template for RTAs (EPAs?)

LIST OF COMMITMENTS ON **COMMERCIAL PRESENCE**

| Sector or Subsector | Reservations |
|---------------------|--|
| Consulting Services | No more than 3 providers per 100.000 inhabitants |
| Life Insurance | Foreign shareholding limited to 45% |
| Hotel services | Foreign invested hotel operators (total foreign capital >50%) may be subject to 5% tourism surcharge on local turnover |



Domestic Regulation (Art. VI)

- Administration must be ‘reasonable, objective and impartial’
- Timely processing of applications
- Independent review of decisions (tribunals)
- (Currently weak) rules on
 - licensing requirements and procedures
 - qualification requirements and procedures (also verification and recognition of foreign qualifications)
 - technical/professional standards
- Must be
 - based on objective & transparent criteria
 - no more burdensome than necessary
 - not in themselves restrictions on trade (licensing procedures)
- **Mandate: Negotiations on DR Disciplines (now in DDA)**



Transparency (Art. III)

- Governments are required to publish domestic regulations affecting service operations
- Establish an 'enquiry point' for information
- Respond promptly to queries
- Notify the WTO Council for Trade in Services annually of relevant changes in laws, regulations, or administrative guidelines



Policy Exceptions

(Articles XIV & XIVbis)

■ General Exceptions

- Governments may *for example* take measures to:
 - a. protect public morals/maintain public order
 - b. protect human, animal or plant life or health
 - c. secure compliance with existing laws on fraud, confidentiality, safety etc.
- Application of measures must not constitute arbitrary or unjustifiable discrimination, or a disguised restriction on trade.

■ Security Exceptions



Discussion

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